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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BRANDON CAMPBELL, Plaintiff and Respondent, v. DOORDASH INC., Defendant and Appellant.	A159296 (City & County of San Francisco No. CGC-19-575383)

DoorDash Inc. (DoorDash) appeals from the trial court's order denying its petition to compel arbitration of a Private Attorney General Act (PAGA) action brought by its employee, Brandon Campbell (Campbell). DoorDash acknowledges that the California Supreme Court case of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*) precludes California courts from enforcing pre-dispute waivers of the right to litigate PAGA claims, but argues *Iskanian* is no longer good law in light of subsequent United States Supreme Court cases. Other courts, including most recently Division Two of our district in *Olson v. Lyft, Inc.* (Oct. 29, 2020, No. A156322) 2020 WL 6336102, have uniformly rejected this argument. We join them in holding *Iskanian* is good law and California courts remain bound

by it. Accordingly, we affirm the order denying arbitration of Campbell's PAGA action.

FACTUAL AND PROCEDURAL BACKGROUND

DoorDash is a same-day, on-demand delivery company that delivers goods from local restaurants and stores to its customers for a fee. DoorDash guarantees a certain minimum pay to its workers, known as Dashers, for each delivery. The guaranteed minimum pay amount depends on various factors such as order size, distance, and delivery logistics. To place an order, a customer uses the DoorDash smartphone app and selects items to be delivered from a participating business. The app displays a price, which includes the total cost of the items and a service/delivery fee. When the customer places an order, the customer's credit card is charged and a Dasher picks up the items from the business and delivers them to the customer. The customer may tip the Dasher through the app.

In early 2019, several news sources reported DoorDash had been using customer tips to satisfy its Dashers' guaranteed minimum pay. These reports explained that if the guaranteed minimum pay for a job is $10, DoorDash first pays its Dasher a "base pay" of $1. "If that minimum is $10 and you tip $5, then DoorDash kicks in the $1 base plus an additional $4" to meet the $10 minimum. "If . . . you tip $9, then DoorDash pays only the $1 base" to meet the $10 minimum. "If . . . you tip nothing, DoorDash pays the $1 base plus an additional $9." The reports stated: "DoorDash's policy of '[a]djusting [its] contribution, depending on the tip, flies in the face of how customers have traditionally viewed the act of tipping: as a bonus that's in addition to a set, if low, base salary from the company.' " "When people add additional tips to their delivery service tab, they reasonably assume they are tipping the delivery person—rather than the company." " 'Consumers are basically

subsidizing [DoorDash's] promised minimum payment, and it's extremely deceptive.' "

On April 19, 2019, Campbell, a Dasher, filed a PAGA action (Lab. Code, §§ 2698 *et seq*.) against DoorDash alleging DoorDash's tipping policy violated Labor Code section 351, which provides that an employer shall not "collect, take, or receive" an employee's gratuity, and section 353, which requires employers to "keep accurate records of all gratuities received."

DoorDash filed a petition to compel arbitration and stay proceedings[1] on the basis that its Independent Contractor Agreement, which Campbell signed, provided that "any and all claims arising out of or relating to this Agreement," including "the payments received by [Dashers] for providing services to consumers," shall be submitted to binding arbitration. The parties also waived their "right to have any dispute or claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or representative action—including but not limited to actions brought pursuant to . . . PAGA. . . ." DoorDash recognized that the California Supreme Court case of *Iskanian* prohibits the pre-dispute waiver of the right to litigate PAGA claims, but argued *Iskanian* did not survive the United States Supreme Court's decision in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 (*Epic Systems*), which "reiterated courts' obligation to enforce arbitration agreements according to their terms."

Campbell opposed the petition, asserting the trial court was bound by *Iskanian* because California trial courts and Courts of Appeal must follow California Supreme Court decisions on federal questions unless the United States Supreme Court has decided the same issue differently. (Citing *Correia*

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[1] DoorDash's request for a stay, which the trial court denied, is not at issue in this appeal.

v. NB Baker Electric, Inc. (2019) 32 Cal.App.5th 603, 619 (*Correia*).) Campbell argued that because *Epic Systems* did not consider whether PAGA waivers are enforceable, the court remained bound by *Iskanian*. Campbell also argued there was nothing in *Epic Systems* that suggested *Iskanian* was wrongly decided.

The trial court denied DoorDash's petition to compel arbitration, stating "California courts are bound by *Iskanian*'s holding that a waiver of an employee's right to bring a representative action in any forum violates public policy and that this rule is not preempted by the FAA [Federal Arbitration Act]." " 'Although the *Epic* court reaffirmed the broad preemptive scope of the [FAA], *Epic* did not address the specific issue before the *Iskanian* court involving a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum.' " (Quoting *Correia*, *supra*, 32 Cal.App.5th at pp. 619–620.) "Furthermore, there is no evidence that the State consented to any waiver of the employee's right to bring the PAGA claim in court." (Citing *Correia*, *supra*, 32 Cal.App.5th at pp. 624–625 ["we agree with [courts] that have held *Iskanian*'s view of a PAGA representative action necessarily means that this claim cannot be compelled to arbitration absent some evidence that the state consented to the waiver of the right to bring the PAGA claim in court"].) DoorDash appeals.

DISCUSSION

We conclude the trial court properly denied DoorDash's petition to compel arbitration of Campbell's PAGA action.

PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the

proceeds of that litigation going to the state." (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) The Legislature enacted PAGA "to remedy systemic underenforcement of many worker protections" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545) and to enhance the state's enforcement of labor laws by "allow[ing] aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies [are] to retain primacy over private enforcement efforts" (*Iskanian*, *supra*, 59 Cal.4th at p. 379). Although PAGA empowers employees to act as the agent of the Labor Commissioner, the governmental entity "is always the real party in interest." (*Id.* at p. 382.) A PAGA action is therefore "a type of qui tam action" " ' "designed to protect the public and not to benefit private parties." ' " (*Id.* at pp. 382, 387.)

In *Iskanian*, the California Supreme Court examined two related questions regarding the pre-dispute waiver of PAGA claims: (1) whether arbitration agreements requiring employees to waive their right to bring PAGA actions are unenforceable under state law, and if so, (2) whether the FAA preempts that rule. (*Iskanian*, *supra*, 59 Cal.4th at p. 378.) First, the court held that pre-dispute waivers requiring employees to relinquish the right to assert a PAGA claim on behalf of other employees were prohibited, as such waivers violate public policy and "harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Id.* at p. 383.) Second, the court held the FAA did not preempt this rule invalidating PAGA waivers in arbitration agreements because "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state [Labor and Workforce Development] Agency." (*Id.* at p. 384.) PAGA actions "directly enforce the *state's* interest in penalizing and deterring employers

who violate California's labor laws." (*Id.* at p. 387.) The FAA, which "aims to promote arbitration of claims belonging to the private parties to an arbitration agreement," "does not aim to promote arbitration of claims belonging to a government agency." (*Id.* at p. 388.) This "is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances." (*Ibid.*)

Four years after *Iskanian* was decided, the United States Supreme Court in *Epic Systems* addressed the FAA's preemptive effect over a provision of the National Labor Relations Act (NLRA) that guarantees workers the right to engage in "concerted activities." (*Epic Systems*, *supra*, 138 S.Ct. at pp. 1619–1620, citing 29 U.S.C. § 157.) The employees in that case resisted arbitration on the ground that an arbitration agreement prohibiting class actions was illegal under the NLRA and therefore unenforceable. (*Id.* at p. 1622; see 9 U.S.C. § 2 [under the FAA, courts may refuse to enforce arbitration agreements " 'upon such grounds as exist at law or in equity for the revocation of any contract' "].) The United States Supreme Court disagreed and declined to "read a right to class actions into the NLRA." (*Id.* at p. 1619.) The Court reiterated that the FAA instructs federal courts to enforce arbitration agreements according to their terms, and rejected any NLRA exception to the FAA. (*Id.* at p. 1624.)

In the last two years since *Epic Systems* was decided, California courts have uniformly rejected the argument that *Epic Systems* overruled *Iskanian*. In *Correia*, *supra*, 32 Cal.App.5th at pp. 608, 619, the Court of Appeal held a pre-dispute waiver of PAGA claims was unenforceable and rejected the employer's argument that "*Iskanian* is no longer binding [in light of] . . . *Epic*

Systems." Noting that California trial and appellate courts are bound by the California Supreme Court's decisions on federal questions unless the United States Supreme Court has decided the same question differently, the court stated: "Although the *Epic* court reaffirmed the broad preemptive scope of the [FAA], *Epic* did not address the specific issues before the *Iskanian* court involving a claim for civil penalties *brought on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum." (*Id.* at p. 609.) The claim at issue in *Epic Systems* differed "fundamentally from a PAGA claim" because the employee in *Epic Systems* was "asserting claims *on behalf of other employees*," whereas a plaintiff who brings a PAGA action "has been deputized by the state" to act " 'as "the proxy or agent" of the state' " to enforce the state's labor laws. (*Correia*, *supra*, at pp. 619–620.) Because *Epic Systems* did not "decide the *same* question differently," its "interpretation of the FAA's preemptive scope [did] not defeat *Iskanian*'s holding or reasoning for purposes of an intermediate appellate court applying the law." (*Ibid.*)

Similarly, in *Collie v. Icee Company* (2020) 52 Cal.App.5th 477, 482 (*Collie*), the Court of Appeal rejected an employer's argument that "*Iskanian* [was] no longer good law after the United States Supreme Court's decision in *Epic*." The court noted *Epic Systems* did not address "the unique nature of a PAGA claim"—that is, the " ' " 'PAGA litigant's status as "the proxy or agent" of the state' and his or her 'substantive role in enforcing our labor laws on behalf of state law enforcement agencies.' " ' [Citation.]" (*Collie*, *supra*, at p. 483.) "*Epic*, therefore, does not undermine *Iskanian*'s . . . characterization[] of PAGA claims as law enforcement actions in which plaintiffs step into the shoes of the state." (*Collie*, *supra*, at p. 483.) The court held that while *Epic Systems* "reconfirmed the breadth of the FAA," a

pre-dispute PAGA waiver remained unenforceable without a showing that the state—which is the real party in interest in PAGA actions—consented to the waiver. (*Collie*, *supra*, at p. 483; see also *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 869–872 [employee's pre-dispute agreement to arbitrate PAGA claims is unenforceable absent a showing the state also consented to the agreement because the state is the real party in interest]; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445–449 [same].)

Several other Courts of Appeal, including Division Two of our district, have reached the same conclusion—that *Epic Systems* did not overrule *Iskanian*. (*See, e.g., Zakaryan v. The Men's Wearhouse, Inc.* (2019) 33 Cal.App.5th 659, 671 ["*Epic Systems* did not overrule *Iskanian*"], overruled on another ground by *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 197, fn. 8; *Provost v. YourMechanic, Inc.* (Oct. 15, 2020, No. D076569) 2020 WL 6074632, at pp. *7, 8 ["reaffirm[ing]" the analysis and decision in *Correia* that *Epic Systems* did not overrule *Iskanian*]; *Olson v. Lyft, Inc.*, *supra*, 2020 WL 6336102 [Division Two case citing *Correia* with approval].) DoorDash urges us not to follow the above cases because "[a] decision of a Court of Appeal is not binding in the Courts of Appeal," (quoting Witkin, Cal. Proc. 5th Appeal, § 498), and because there are a number of purported flaws with the decisions. DoorDash asserts, for example, that the *Zakaryan* case did not include sufficient analysis and that the Court of Appeal in *Correia* "did not have the benefit of complete briefing on the issue" as the employer "devoted only four paragraphs of its brief to its *Epic Systems* argument." We find the Court of Appeal cases to be thorough and well-reasoned and we join these courts in concluding *Epic Systems* did not overrule *Iskanian*.

DoorDash also attempts to distinguish the cases on the basis that the arbitration agreement Campbell signed was not mandatory; instead, he

simply "chose not to opt out of" it. DoorDash argues the FAA should apply "with particular force" to individuals who "*voluntarily*" choose arbitration. However, " '*Iskanian*'s underlying public policy rationale—that a PAGA waiver circumvents the Legislature's intent to empower employees to enforce the Labor Code as agency representatives and harms the state's interest in enforcing the Labor Code—does not turn on how the employer and employee entered into the agreement, or the mandatory or voluntary nature of the employee's initial consent to the agreement' "; rather, a " 'PAGA claim provides a remedy inuring to the state . . . and the law . . . broadly precludes private agreements to waive such [] rights.' " (*Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 647–648, quoting *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109; *see also Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal.App.5th 1197, 1203 [refusing to enforce a pre-dispute waiver of a representative PAGA claim merely because the employee had the opportunity to opt out of the waiver].) Accordingly, it is immaterial whether Campbell voluntarily entered into the arbitration agreement or did so as a condition of becoming a Dasher for DoorDash.

DISPOSITION

The trial court's order denying DoorDash's petition to compel arbitration and stay proceedings is affirmed. Plaintiff Brandon Campbell shall recover his costs on appeal.

Petrou, J.

WE CONCUR:

Siggins, P.J.

Simons, J.*

* Associate Presiding Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.